No. 79-6853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEAH LYNN PARRISH WEBB,

Petitioner,

v.

JAMES THOMAS WEBB,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The question presented for review is as follows:

Does Article IV, §I of the United States Constitution, demand that Georgia, a signatory to the Uniform Child Custody Jurisdiction act, give full faith and credit to a Florida decree rendered immediately prior to Georgia's acceptance of unqualified jurisdiction over an action to modify a custody decree when no intervening changes of circumstances had occurred since the rendition of the Florida decree?

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OPINION BELOW

The opinion of the Georgia Supreme Court is reported at 245 Ga. 650, 266 S.E.2d 463 (J.A. 48-51). The denial of Petitioner's Motion for Rehearing by that court is found at 245 Ga. 653, 266 S.E.2d 463 (J.A. 53).

JURISDICTIONAL STATEMENT

The Georgia Supreme Court affirmed the trial court's ruling on April 8, 1980. Following Petitioner's Motion for Rehearing filed on April 14, 1980, said court denied rehearing on April 22, 1980.

Petitioner's Petition for Writ of Certiorari to the Supreme Court of Georgia was docketed June 27, 1980 and certiorari was granted on October 6, 1980 by this court.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3) to review by writ of certiorari the final rulings of the highest court of Georgia which involve a federal constitutional law question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

Constitution

Article IV, Section I of the United States Constitution

Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Federal Statute

28 U.S.C. §687; 28 U.S.C.A. §1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

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Georgia

Ga. Code §30-127

(a) In all cases of divorce granted, the party not in default shall be entitled to the custody of the minor children of the marriage. The court, however, in the exercise of a sound discretion, may look into all the circumstances of the parties, including the improvement of the health of the party seeking a change in custody provisions, and, after hearing both parties, make a different disposition of the children, placing them, if necessary, in possession of guardians appointed by the judge of the probate court. The court may exercise a similar discretion pending the application for divorce. In all such cases and in cases where a change in custody is sought,

where the child has reached the age of 14 years, such child shall have the right to select the parent with whom such child desires to live and such selection shall be controlling unless the parent so selected is determined not to be a fit and proper person to have the custody of said child.

(b) In any case in which a judgment has been entered awarding the custody of a minor, on the motion of any party or on the motion of the court that portion of the judgment effecting visitation rights between the parties and their minor children may be subject to review and modification or alteration, but not more often than once in each two-year period following the date of the entry of such judgment, without the necessity of any showing of a change in any material conditions and circumstances of either party or the minor. The provisions of this section shall not limit or restrict the power of the court to enter a judgment relating to the custody of a minor in any new proceeding based upon a showing of a change in any material conditions or circumstances of a party or the minor.

(c) In the event of any conflict between this section and any provision of Chapter 74-5, the provision of Chapter 74-5 shall apply.

(Acts 1957, pp. 214, 412; 1962, pp. 713, 714; 1976, p. 1050; 1978, pp. 258, 272, eff. Jan. 1, 1979.)

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STATEMENT OF THE CASE

Petitioner Leah Lynn Parrish Webb and Respondent James Thomas Webb were divorced in Nashville, Georgia on September 22, 1977. (J.A. 2, 3). Petitioner was awarded custody of the parties' minor child, Shane Scott Webb, who was four years old at the time of the divorce. Petitioner subsequently moved to Florida in November of 1977 with the minor child (T.83) where she has continued to live until the present time. Contrary to the decree, on February 17, 1979, Respondent, who was residing in Nashville, Georgia, went to Petitioner's residence in Gainesville, Florida and without the knowledge or permission of Petitioner took Shane Webb back to Georgia. (T.24). On March 8, 1979, Petitioner filed an action in the Circuit Court, Eighth Judicial District, Alachua County, Florida, under the Uniform Child Custody Jurisdiction Act for custody of Shane Webb. (J.A.6-16). A Restraining Order was entered by that court without notice on March 8, 1979, (J.A.17, 18), and a copy of this Order and the petition for custody was served personally on Respondent at his residence in Nashville, Georgia on March 13, 1979. (J.A.15). Though personally served, the father made no response or appearance in the Florida action (J.A.25), but instead on March 23, 1979, Respondent filed an action for custody in the Superior Court of Berrien County, Georgia. (J.A.20-24). A copy of this petition was served personally on Petitioner at her residence in Alachua County, Florida on March 29, 1979. (J.A.23,24). On April 18, 1979, and prior to any hearing on the petition filed by Respondent in Georgia, the Circuit Court, Eighth Judicial District, Alachua County, Florida, after hearing evidence on the issue of custody, entered a Final Judgment which es-

tablished the Georgia decree of September 22, 1977, as the judgment of the court and granted custody of Shane Webb to Petitioner. (J.A.25, 26). Respondent, throughout, failed to make any appearance in the Florida action.

On April 24, 1979, Petitioner filed a Motion to Dismiss and Answer in the action filed by Respondent in the Superior Court of Berrien County, Georgia, (J.A.27-32) and on April 26, 1979, filed an amendment thereto. (J.A.33-37). Petitioner denied that the Superior Court of Berrien County, Georgia had jurisdiction over her person, or over the subject matter of the action, and asked that full faith and credit be accorded to the Florida judgment entered on April 18, 1979. A counterclaim for a writ of habeas corpus was also filed. (J.A.36).

On May 10, 1979, a hearing was held in the Superior Court of Berrien County, Georgia, and in an order dated June 21, 1979 this Georgia court found that it had jurisdiction to determine custody on three bases: (1) Georgia was the home state of the minor child, (2) the child and one contestant had a significant connection with Georgia and there was substantial evidence concerning the child's present or future protection, training, and personal relationships in the state, and (3) the child had been abandoned by Petitioner in Gainesville, Florida, and there was an emergency situation requiring protection of the minor child.[1] (J.A.39,40). Totally ignoring the Florida decree, the court awarded

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[1]The only evidence relied upon by the Georgia court to support the emergency situation and abandonment was the testimony of the Respondent. Petitioner, on the other hand, had testified that she had arranged for care for the child with her neighbors prior to her leaving on a weekend visit. (T.89,90). Respondent had testified previously that the child was with these neighbors when the Respondent arrived in Florida to take the child back to Georgia. (T.24).

custody of Shane Webb to Respondent, upon finding that Petitioner had moved six times since her divorce from Respondent, had abandoned the child in Gainesville, Florida by leaving him without adult supervision for a weekend, and was not properly caring for the child. (J.A.39). The court found that Respondent had remarried and owned a home, and that his home life was more conducive to raising a child than that of the mother, and that it was in the child's best interest to remain with his father. (J.A.40,41).

On July 19, 1979, Petitioner appealed the Judgment of the Superior Court of Berrien County, Georgia, to the Supreme Court of Georgia. (J.A.42, 43). On April 8, 1980, the Supreme Court of Georgia at 245 Ga. 650, 266 S.E.2d 463 (1980) (J.A.48-51), affirmed the judgment of the Superior Court of Berrien County, Georgia. In an opinion expressing the views of four Justices, the Court found that the evidence in the trial court authorized a finding that Respondent's taking of Shane Webb from Florida was justified by the existence of an emergency situation. It was also held that while the trial court had a duty to confer with the Florida court concerning the pending action there, the Florida court had a similar responsibility which was not met. The Georgia Supreme Court held that since the Florida action had gone to final judgment before the Georgia action was heard, a dismissal of the Georgia action would have meant that the custody dispute between the parties could not have been resolved by any court, and therefore, the pendency of the Florida action did not preempt the jurisdiction of the Georgia court. As to the trial court's findings of changed circumstances affecting the welfare of the child, the Supreme Court of Georgia found that there had been no abuse of discretion, and the award of custody to Respondent was affirmed.

Petitioner's Enumerations of Error filed in the Georgia Supreme Court raised, among other issues, the question of whether Georgia was required to grant the Florida judgment full faith and credit, and dismiss the Georgia case because the claims raised therein were *res judicata.* The Supreme Court of Georgia, though recognizing the finality of the Florida judgment, declined to specifically rule on the full faith and credit question presented. However, by ruling that the Florida decree did not preempt Georgia's jurisdiction, and basing its own jurisdiction on findings inconsistent with those of the Florida Court, it impliedly rejected the notion that full faith and credit should have been accorded to the Florida decree.

A dissenting opinion by three Justices stated that the issue of whether an emergency situation exists or abandonment has occurred should be determined by the courts in the state where these acts are alleged to have happened. *Supra.* at 653-64, 266 S.E. 2d at 465-66. (J.A.53). This opinion characterized the majority opinion as condoning "child snatching."

Petitioner sought rehearing by the Supreme Court of Georgia on April 14, 1980. *Supra.* at 653, 266 S.E. 2d at 463 (J.A.52). Rehearing was denied on April 22, 1980. *supra.* at 653, 266 S.E. 2d at 463.

Petitioner filed for leave to proceed *in forma pauperis* in this Court, and for a writ of certiorari to the Supreme Court of Georgia on June 27, 1980; leave to proceed *in forma pauperis* and a writ of certiorari were granted by this Court on October 6, 1980. (J.A.54).

On or about November 1, 1980, Respondent requested that Petitioner come to Georgia and pick up the minor child. Petitioner complied with his request and has had the child with her in Florida since that time. There has been no change

in the legal status of the child and no agreement between the parties concerning a permanent arrangement for custody of the minor child. Petitioner also has a claim for back child support.

SUMMARY OF ARGUMENT

Article IV § 1 of the Constitution of the United States provides that full faith and credit shall be given in each state to judicial proceedings of every other state. This court, however, on a number of occasions has determined that certain judgments were not entitled to full faith and credit. Judgments appropriately refused full faith and credit were those obtained where there was a lack of subject matter or personal jurisdiction in the rendering court, where due process was not afforded in the rendering court, where fraud existed in the original court proceedings, where the law of the state rendering the judgment did not view the judgment as having a conclusive or res judicata effect, and in the case of custody decrees, where there has been a material change in conditions since the rendering of a child custody decree, and the law of the state which rendered the decree permitted a modification of the decree on that basis.

In the case now before this Court, the Florida custody decree, which was refused full faith and credit by the Georgia courts, was not a judgment falling into the above listed categories, and therefore, was entitled full faith and credit. The court in Florida, rendering the judgment enforcing a prior decree had subject matter jurisdiction and personal jurisdiction over Respondent pursuant to state law, pursuant to the Uniform Child Custody Jurisdiction Act in Florida, and pursuant to principles for exercise of personal juris-

diction and satisfaction of due process set down in *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

There have been no allegations of fraud in the rendering court and no factual basis for such allegations.

Furthermore, Florida custody decrees since the adoption of the Uniform Child Custody Jurisdiction Act, are conclusive and res judicata. Although Florida law does permit a modification of custody on the basis of changed conditions, there was no change of conditions raised by Respondent occurring within the period of three weeks between the hearing and order in Florida on April 18, 1979 and the hearing in Georgia on May 10, 1979.

Child abduction by non-custodial parents with subsequent relitigation of custody in forums of their choice has become a serious national problem. Attempts by the great majority of states to deal with this problem through the adoption of the Uniform Child Custody Jurisdiction Act have been less than fully successful in the absence of a clear statement by this Court on the applicability of the Full Faith and Credit Clause to child custody decrees.

Therefore, there being no legal rationale previously articulated by this Court which can justify the refusal of the Georgia court to grant full faith and credit to the Florida decree, and there being a need for this Court to recognize the applicability of the Full Faith and Credit Clause to child custody decrees to thwart "child snatching" and relitigation in inappropriate forums, the decision of the Georgia Supreme Court, failing to give full faith and credit to the Florida decree, should be reversed.

ARGUMENT

I.

HISTORICAL REVIEW OF THE APPLICATION OF THE FULL FAITH AND CREDIT CLAUSE TO JUDICIAL PROCEEDINGS

Article IV, § 1 of the United States Constitution directs that "Full Faith and Credit shall be given in each state to the public Acts, Records, and Judicial Proceedings of every other state." The Article also provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof." By the Act of May 26, 1790, 28 U.S.C. § 687, 28 U.S.C.A., § 1738, Congress provided that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

There have been very few exceptions to the application of its provisions because the purpose of Article IV § 1 was "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of origin. *Milwaukee Co. v. M. E. White,* 296 U.S. 268, 276, 277, 56 S.Ct. 229, 234, 80 L.Ed. 220 (1935). A judgment from a sister state must be given full faith and credit even though the cause of action merged in the judgment could not have been enforced in the state where the enforcement of the judgment is sought. *Fauntleroy v. Lum,* 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039, 1042 (1908), *Riley v. New York Trust Co.,* 315 U.S.

432, 62 S.Ct. 608, 86 L.Ed. 885 (1942). The denial of full faith and credit to a judgment from a sister state is not justified even when the rendering court made a mistake in interpreting the law of the second state, *Fauntleroy v. Lum, supra.* As stated in *Marin v. Augedahl,* 247 U.S. 142, 149, 38 S.Ct. 452, 454, 62 L.Ed. 1038, 1042 (1918) "whether the decision was right or wrong is not open to discussion here. If wrong it was subject to correction on proper application to the court which made it, or on appeal, but it was not void or open to collateral attack."

Procedural irregularities in the court of the first state, not amounting to a denial of due process of law, have also been held sufficient to invalidate the judgment rendered in the first state. *Paull v. Cook,* 135 W.Va. 833, 65 S.E.2d 750 (1951).

One exception that has been allowed in granting of full faith and credit to a judgment of a sister state is when there was a lack of subject matter or personal jurisdiction in the court of the first state. As held in *Estin v. Estin,* 334 U.S. 541, 68 S.Ct 1213, 92 L.Ed. 1561, 1568 (1948), "A judgment of a court having no jurisdiction to render it is not entitled to the full faith and credit which the Constitution and statutes of the United States demand." However, if the judgment on its face appears to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is presumed unless disproved by extrinsic evidence or by the record itself. *Adam v. Saenger,* 303 U.S. 59, 58 S.Ct. 454, 82 L.Ed. 649 (1938); *Milliken v. Meyer,* 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 282 (1940).

Other exceptions to the granting of full faith and credit to judgments of sister states include judgments obtained in violation of procedural due process. For instance, a judgment for alimony arrearage entered without any actual

notice to the husband and without any form of service of process calculated to give him notice of the proceedings was not entitled to full faith and credit in a sister state. *Griffin v. Griffin,* 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 635 (1946).

Judgments that are not final under the law of the state whosecourt granted them also have been held not entitled to full faith and credit in a sister state. Although there is nothing in the Full Faith and Credit Clause specifically limiting its scope to final judgments, the Supreme Court has said:

. . ."[A] judgment has no constitutional claim to a more conclusive or final effect in the state of the forum that it has in the state where rendered. . .[I]t is clear that the state of the forum has as much leeway to disregard the judgment, to qualify it, or to depart from it as does the state where it was rendered." *New York ex. rel. Halvey v. Halvey,* 330 U.S. 610, 614-615, 67 S.Ct. 903, 906, 91 L.Ed. 1133, 1136 (1947).

Decrees for alimony, for example, whose periodic payments can be modified by the rendering court at any time after payments are in arrears are not final judgments pursuant to the finality requirements articulated by this Court in *Lynde v. Lynde,* 181 U.S. 183, 21 S.Ct. 555, 45 L.Ed. 810 (1901). Decrees for alimony which by state law cannot be changed after they are rendered or when the sums have become past due, however, are entitled to full faith and credit. *Sistare v. Sistare,* 218 U.S. 1, 30 S.Ct. 682, 54 L.Ed. 905 (1910).

Despite the few exceptions previously discussed, the Full Faith and Credit Clause is strictly construed and leaves little room for the non-recognition of another state's judgments. *Broderick v. Rosner,* 294 U.S. 629, 55 S.Ct. 589, 79 L.Ed. 1100 (1935).

II.

GEORGIA ERRED IN FAILING TO EXTEND FULL FAITH AND CREDIT TO THE FLORIDA DECREE SINCE THE FLORIDA DECREE MET ALL REQUIREMENTS FOR JURISDICTION, DUE PROCESS AND FINALITY REQUIRED FOR ITS APPLICATION

A. The Florida Court Acquired In Personam Jurisdiction Over Respondent.

By entering the state of Florida to remove Shane Webb from Petitioner, the child's legal custodian, Respondent subjected himself to the jurisdiction of the Florida court. When he was personally served in Georgia with process in the Florida action brought by Petitioner, Respondent was properly before the Florida court and was therefore bound by its judgment on the question of whether Petitioner's conduct in February of 1979 constituted grounds to change legal custody of the parties' child. He should not have been permitted to relitigate that issue in the Georgia court.

In *Shaffer v. Heitner,* 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), this court held that every assertion of state court jurisdiction must be evaluated under the standards of *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L. Ed. 95 (1945). The validity of the exercise of jurisdiction by the Florida court in this case thus depends on whether Respondent had sufficient "contacts, ties, or relations" with Florida to make an assumption of jurisdiction appropriate and whether the out of state service employed did not offend traditional notions of fair play. *Supra,* 326 U.S. at 319.

a. Respondent had Sufficient Contacts with Florida to make Assumption of Jurisdiction Appropriate

An essential criterion in determining the existence of sufficient contacts for the exercise of personal jurisdiction over a non-resident is whether the quality and nature of the defendant's activity is such that it is reasonable and fair to require him to conduct his defense in that state. *Supra,* 326 U.S. at 316, 317, 319. No mechanical test can be employed, but each case must be weighed to determine whether the requisite "affiliating circumstances" are present. *Hanson v. Denckla,* 357 U.S. 235, 246, 78 S.Ct. 1228, 1235, 2 L.Ed.2d 1283 (1958). *accord. Kulko v. Superior Court,* 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d (1978).

The state of Florida has a legitimate and compelling interest in insuring that valid child custody orders are enforced with respect to minor children within its territory. Respondent's removal of the child from Florida in violation of a valid custody order offended that interest. Since the child and the Petitioner were residents of Florida at the time of Respondent's removal of the child, and since the activity of removing the child in violation of an existing custody decree was carried out in Florida, it is valid and fair for him to defend an action seeking enforcement of the decree in Florida. The only alternative, that of forcing Petitioner to pursue the Respondent and bring suit in his home territory, would certainly be unfair to Petitioner, especially since virtually all evidence concerning the child's care, the wrongful removal, and alleged "abandonment" existed in Florida.

The assertion of personal jurisdiction over Respondent by the Florida court is not inconsistent with this court's decision in *Kulko v. Superior Court,* 346 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978). In that case, the attempt to exercise

personal jurisdiction by a California court over a non-resident parent in a child support proceeding was found to offend the Due Process Clause of the Fourteenth Amendment. The only significant contact, however, that the non-resident had with California was his consent to his minor child's residence in the state with his mother. This was found insufficient to justify California state court jurisdiction, even though it might arguably have had some effect in that state. Unlike the facts in *Kulko,* Respondent's conduct in Florida was concrete and performed while he was physically present in the state. His removal of Shane Webb from Florida without legal sanction from the courts of any state, was the basis for the action brought against Respondent in Florida, and therefore satisfies the minimum contacts requirement for state court jurisdiction.

b. Respondent was Afforded Actual Notice and An Opportunity to be Heard

In addition to satisfaction of minimum contacts requirements for the exercise of jurisdiction over Respondent, the Florida court also employed a method of service which meets requirements for due process. Respondent was personally served with the Florida petition by a law enforcement officer on March 13, 1979, some 35 days prior to the hearing on the matter in Florida. (J.A.15). Respondent never challenged the fact of or the sufficiency of the service upon him in either the Florida or Georgia proceedings (J.A.25)[2] and, in fact, employed the same service on Petitioner in the Georgia action he filed subsequent to service on him of the Florida petition.

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[2]The personal service employed is specifically provided for in the Uniform Child Custody Jurisdiction Act §5 adopted at Ga. Code §74-506 and West's F.S.A. §61.1312.

B. Personal Jurisdiction: The Confusing Opinion of May v. Anderson

The one case in which this court has considered requirements for a court's jurisdiction in a custody case for purposes of the application of Full Faith and Credit was *May v. Anderson,* 345 U.S. 529, 73 S.Ct. 840, 97 L.Ed. 1221 (1953). Unfortunately, the plurality opinion in that case, rather than resolving the issue, has caused considerable confusion. In *May, supra,* the parties were married in Wisconsin and lived in Wisconsin until separation when Mrs. Anderson (May) went to Ohio with the children in December, 1946. The husband filed suit for divorce and custody of the minor children in Wisconsin in January, 1947. Service of process upon Mrs. Anderson (May) was by personal delivery of a copy of the Wisconsin summons and petition authorized by Wisconsin statutes for use in an action for divorce, but not clearly available for use in custody proceedings.[3] Mrs. Anderson entered no appearance, and the Wisconsin court entered a divorce decree granting Mr. Anderson custody of the children. Mr. Anderson, armed with the divorce order, retrieved the children from Mrs. Anderson. In 1951, the children visited with Mrs. Anderson (May), and she thereafter refused to return them. Mr. Anderson filed a writ of habeas corpus in Ohio based on his Wisconsin judgment. The Ohio Probate Court granted Full Faith and Credit to the Wisconsin decree, and issued an order allowing the writ and directing that the children be released to the custody of the father. The Ohio Court of Appeals affirmed the Probate Court order, and Mrs. Anderson (May) appealed.

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[3]*May v. Anderson,* 345 U.S. 529, 530-31, 73 S.Ct. 840, 842, 97 L.Ed. 1221 (1953).

The applicability of the Full Faith and Credit Clause to the situation presented in *May* was a difficult issue dividing the court four ways. The plurality opinion written by Justice Burton held that full faith and credit need not have been given to the Wisconsin decree awarding custody of the children to Mr. Anderson.

Failing to distinguish prior cases defining *in personam* jurisdiction[4] and especially guidelines set forth in *International Shoe Company v. Washington,* 326 U.S. 310, 73 S.Ct. 154, 90 L.Ed. 95 (1945), Justice Burton apparently created a new rule that a custody decree, though meeting due process requirements, need not be given full faith and credit if the defendant had not been domiciled, resident nor present within the rendering state. Although it was clear from the recitation of the facts that the extraterritorial service employed by Mr. Anderson in the original Wisconsin proceedings was not specifically permitted in custody proceedings initiated in Wisconsin, Justice Burton's holding is not limited to these facts.[5] To sustain his position, Justice Burton relied on *Pennoyer v. Neff,*[6] as applied in *Estin v. Estin,*[7] a case where an ex parte divorce was held not to cut off the absent wife's right to support under a prior order. Justice Burton's argument was that since the right to custody is "far more precious" than mere money claims, then

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[4]*Milliken v. Meyer,* 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940), *Hess v. Pawlowski,* 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927); *International Shoe Co. v. Washington, supra.*

[5]*May v. Anderson,* 345 U.S. at 531, 73 S.Ct. at 842.

[6]95 U.S. 714 (1877).

[7]334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561 (1948).

custody cannot be denied without personal jurisdiction in these cases.[8]

Justice Burton's view, however, has been heavily criticized. First, this court, even at that time, had sapped *Pennoyer v. Neff* of much of its strength through cases such as *International Shoe v. Washington*[9] and *Milliken v. Meyer.*[10] Secondly, *Pennoyer v. Neff* itself had made an exception for cases involving "status," and many authorities feel that problems of children and custody problems particularly should be viewed as "status" cases.[11]

Justice Burton's application of stricter rules for personal jurisdiction over a party in custody cases does little to prevent or discourage a parent, who believes his chances of gaining custody in one state are poor, from circumventing that state's power by avoiding service and forcing the other parent to litigate custody in a more favorable forum.

The plurality opinion reserves the question of what rule should apply when a parent "kidnaps" his child and then deliberately fails to appear in an action brought by the other parent.[12] Nevertheless, Justice Burton failed to make note that the prolonged litigation in the case before him began when the mother wrongfully "retained" her children in

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[8]See Hazard, "*May v. Anderson:* Preamble to Family Law Chaos," 45 Va.L. Rev. 379 (1959). Bodenheimer, "The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws." 22 Vanderbilt L.Rev. 1207 (1969).

[9]*Id.*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

[10]*Id.*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940).

[11]Restatement (First) of Conflicts of Laws, §§117,145 (1934); Ratner, "Child Custody in a Federal System," 62 Michigan L. Rev. 795, 796 (1964); 43 C.J.S. §6(b), pp. 71-75.

[12]*Id.*, 345 U.S. at 541, 73 S.Ct. at 847, at Footnote 8.

violation of an outstanding custody decree. Thus, Justice Burton appeared to sanction unlawful retention of a child after a visitation period, but not unlawful removal from the lawful custodian in the first place.

Three Justices felt that Full Faith and Credit should have been accorded to the Wisconsin decree. Justice Jackson joined by Justice Reed argued that while personal jurisdiction of all parties as defined in the plurality opinion, is highly desirable to make certain they have valid notice and opportunity to be heard, "the assumption that it overrides all other considerations and in its absence a state is constitutionally impotent to resolve questions of custody flies in the face of our own cases."[13] The plurality opinion, according to Justice Jackson places the convenience of the leave taking parent above the welfare of the child, creating the unpleasant dilemma in *May* that neither Wisconsin nor Ohio could get jurisdiction over the parent in the adjoining state, leaving custody as an unresolved issue.[14]

Justice Jackson argued that the state of the domicile of the children, given sufficient notice to the defendant parent, should be the appropriate forum for the litigation of custody disputes. This view was a prevailing view at the time and was the view endorsed in the Restatement (First) of Conflict of Laws.[15]

Justice Frankfurter, on the other hand, held in his concurring opinion that because a child's welfare in a custody case has such a claim upon the state, its discretion should never be foreclosed by a prior adjudication.[16]

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[13]*Id.*, 345 U.S. at 541, 73 S.Ct. at 847.

[14]*Id.*, 345 U.S. at 539, 73 S.Ct. at 846.

[15]Restatement (First) of Conflict of Laws, § § 145-148 (1934).

[16]*Supra*, 345 U.S. at 536, 73 S.Ct. at 844-45.

It is possible to distinguish the present case from *May, supra,* on two bases. First, the extraterritorial service employed in this case, unlike in *May,* was specifically intended and designed by Florida law for service on non-resident parties to custody actions. Second, and more importantly, Justice Burton did not specifically extend his opinion to situations in which the child was unlawfully or surreptitiously taken by one parent from the other. Certainly, Shane Webb, the child in the present action, was unlawfully taken without permission from the Petitioner and without prior sanction of any court.

It is clear, however, that the plurality opinion has been widely criticized for its restrictive and confusing definition of personal jurisdiction which stresses the rights of the parent having physical custody at the expense of the petitioner-parent and the minor child and benefits the parent-kidnapper by forcing the other parent into the forum of his choice.[17]

Few states have chosen to restrict their exercise of jurisdiction in custody cases in compliance with the plurality opinion. Even the Restatement (Second) of Conflict of Laws §§69, 70 (1971) does not exclusively follow the *May* holding since it finds jurisdiction to determine custody in any state where the child is domiciled, where a child is physically present, or where there is *in personam* jurisdiction over the claimants. The Uniform Child Custody Jurisdiction Act,[18]

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[17]Hazard, "*May v. Anderson,* Preamble to Family Law Chaos", 45 Va.L.Rev. 379 (1959); Ratner, "Child Custody in a Federal System," 62 Mich.L.Rev. 795 (1964); Bodenheimer, "Uniform Child Custody Jurisdiction Act, A Legislative Remedy for Children Caught in Conflict of Laws," 22 Vanderbilt L.Rev. 1207 (1969); Sanders, "Prevention of Child Stealing: The Need for a National Policy", 11 Loyola of Los Angeles L.Rev. 829, 836 (1978).

[18]Uniform Child Custody Jurisdiction Act, 9 U.L.A. 116-170.

which sets forth standards for exercise of jurisdiction in the 45 states which have adopted it, also does not follow the *May* plurality opinion. Rather its framers relied upon Justice Frankfurter's concurring opinion and the traditional definition of personal jurisdiction as articulated in *International Shoe v. Washington, supra,* and *Mullane v. Central Hanover Bank, supra,*[19] 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The better view, therefore, is that the plurality opinion and its narrow view of *in personam* jurisdiction should be totally re-examined and recast, rather than simply distinguished on the basis of relatively minor factual differences.

C. Florida Assumed Jurisdiction in Compliance With the Uniform Child Custody Jurisdiction Act

In 1968 in response to the rising tide of parental abductions[20] and constant relitigation of custody, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Child Custody Jurisdiction Act to

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[19]Bodenheimer, "The Uniform Child Custody Jurisdiction Act, *supra*; Ratner, "Child Custody in a Federal System," *supra*.

[20]Although no precise figures are available to indicate the number of children annually kidnapped by one of their parents, estimates range from figures as low as 25,000 to figures as high as 100,000. 124 Cong.Rec. §501 (daily Ed. June 25, 1978) (remarks of Sen. Wallop); 123 Cong.Rec. E6151 (daily Ed. October 6, 1977) (remarks of Rep. Sawyer).

bring some semblance of order into the existing chaos.[21]

At the present time there are at least 45 states, including Florida and Georgia, which have adopted the Uniform Child Custody Jurisdiction Act.[22]

Both the Florida court and the Georgia court based their jurisdiction over these custody proceedings (J.A.18,40) on the Uniform Child Custody Jurisdiction Act (hereinafter referred to as UCCJA or the Act).[23]

In reviewing the jurisdiction prerequisites for a child custody case, the Act is very broad—so broad, in fact, that it is possible to conclude in many cases that more than one State may actually be capable of accepting jurisdiction. Thus, the threshold question of whether a case may be heard becomes a bifurcated one. The court must first decide if it could accept jurisdiction and then whether it will accept jurisdiction.

Four criteria are set out to determine if a court may

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[21]Uniform Child Custody Jurisdiction Act, Commissioner's Prefatory Note 9 U.L.A. 114 (1979). See an excellent discussion of the UCCJA by Bodenheimer, "The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws." 22 Vanderbilt L.Rev. 6 (1969); Bodenheimer, "The Uniform Child Custody Jurisdiction Act," p.45, in Sanford Katz' *The Youngest Minority, I* American Bar Association, Section of Family Law (1974), reprinted from Vol. III. No. 4, Family Law Quarterly; Sanders, "Prevention of Child Stealing: The Need for a National Policy" 11 Loyola of Los Angeles, L.Rev. 829 (1978), Stern, "Stemming the Proliferation of Parental Kidnapping: New York's Adoption of the Uniform Child Custody Jurisdiction Act," 45 Brooklyn L.Rev. 89 (1978).

[22]Freed and Foster, "Divorce in the Fifty States: An Overview as a August 1, 1980," 6 Family Law Reporter 4043, 4055, (September 2, 1980).

[23]Ga. Code §74-501, et. seq.; West's F.S.A. §61-1302, et. seq.

exercise jurisdiction. In the first place, a court in the child's home state[24] has jurisdiction, and secondly, if there is no home state or the child and his family have equal or stronger ties with another state, a court in that state has jurisdiction.[25] If this alternative test produces concurrent jurisdiction in more than one state, mechanisms are provided in other sections of the UCCJA for a court to stay proceedings where other proceedings concerning the child are pending in a court of another state or for a court to decline jurisdiction upon a finding that it is an inconvenient forum.[26]

If the home state test cannot be met or as an alternative to that test, a court may assume jurisdiction because the child and his parents or the child and at least one contestant have a significant connection with the forum state, and there is available in the state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.[27]

Thirdly, a state may assume jurisdiction if "the child is physically within the state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]."[28] This extraordinary jurisdiction should be

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[24]Home state is defined as a "state in which the child immediately preceding the time involved lived with his parents. . . for at least six consecutive months." UCCJA, (U.L.A.) §2(5), West's F.S.A. §61.1306(5); Ga. code §74-503(e).

[25]UCCJA, (U.L.A.) §3(a) (1); West's F.S.A. §61-1308(1) (a) 1 & 2; Ga. Code §74-504(a) (1).

[26]UCCJA, (U.L.A.) §§6,7; West's F.S.A. §61-1314, §61.1316.

[27]UCCJA, (U.L.A.) §3(a) (2); West's F.S.A. §61.1308(1) (b).

[28]UCCJA, (U.L.A.) §3(a) (3); West's F.S.A. §61.1308(1) (c).

reserved for extraordinary circumstances, See *Application of Lang*, 9 app.Div. 2d 401, 193 N.Y.S.2d 763 (1959), and should not be the basis of jurisdiction when there is child neglect without emergency or abandonment.[29]

Misuse of this emergency jurisdiction provision to circumvent the Act may be the most serious problem which the UCCJA faces in effectively preventing child abduction and relitigation in several states.[30] No better illustration of this problem exists than this very case where the Georgia courts utilized emergency jurisdiction provisions of the UCCJA to justify their jurisdiction to modify the custody decree when it was clear that the child was in no immediate danger at the time of the initiation of the proceedings in Georgia, that all the evidence concerning the alleged abandonment and inappropriate care of the child was in Florida, that Florida, rather than Georgia was clearly the child's home state and that, in fact proceedings in Florida had been initiated weeks prior to those in Georgia and concluded before any hearing on the merits in Georgia.

Finally, if no other state would have jurisdiction under the first three tests or if another state has declined to exercise jurisdiction in favor of another state court on the basis that it is a more appropriate forum, then that court may exercise jurisdiction if it determines it is in the best interest of the child.[31]

Thus, in this action, one looks to UCCJA (U.L.A.) §3 found at West's F.S.A. §61.1308(1) (a) (1) to determine

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[29]UCCJA, (U.L.A.) §3(a) (3) Commissioner's Note at 9 U.L.A. 108.

[30]Stern, "Stemming the Proliferation of Parental Kidnapping", *supra*.

[31]UCCJA, (U.L.A.) §3(a) (4), West's F.S.A. §61.1308(1)(d).

whether the Florida court had jurisdiction as the child's home state.[32]

The evidence clearly shows that Shane lived in the state of Florida with his mother, the Petitioner, from November, 1977 until February 17, 1979. (J.A.11). Proceedings were instituted in Florida to establish, enforce and modify the Georgia judgment less than three weeks after the minor child was taken to Georgia by his father. (J.A.39, 6-14). Therefore, there is no question that Florida had jurisdiction as the home state.

Petitioner further complied with all disclosures mandated by the UCCJA §9 and West's F.S.A. §61.1321, to supply the court with sufficient information upon which informed decisions could be made as to the exercise of jurisdiction. (J.A.11,12)

Petitioner and the Florida court strictly observed UCCJA guidelines for service on out of state residents adopted to provide reasonable notice and an opportunity to be heard to

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[32]For a discussion of Florida's enactment and interpretation of the UCCJA, see Kutun and Fox, "Closing the Custody Floodgate: Florida Adopts the Uniform Child Custody Jurisdiction Act," 6 Fla.State L.Rev. 408, 411-421 (1978).

parents and other interested parties.[33] The record shows that Respondent was personally delivered the Florida petition by a Georgia law enforcement officer (J.A.15,16), and such service was perfected 35 days prior to the hearing on the matter.[34]

Since the Florida courts complied with the jurisdiction and due process provisions of the UCCJA, Georgia, pursuant to the UCCJA provisions codified in Georgia at Ga. Code §74-514, is mandated to recognize and enforce the decree of the Florida courts.

Its failure to do so contravened not only the specific language of its own statute, but also recent case law in which

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[33]UCCJA. (U.L.A.) at §5, also at West's F.S.A. §61.1312 and Georgia Code §74-506 provides:

[Notice to Persons Outside this State: Submission to Jurisdiction]

(a) Notice required for the exercise of jurisdiction over a person outside this State shall be given in a manner reasonably calculated to give actual notice, and may be:

(1) by personal delivery outside this State in the manner prescribed for service or process within this State;

(2) in the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;

(3) by any form of mail addressed to the person to be served and requesting a receipt; or

(4) as directed by the court including publication, if other means of notification are ineffective.

(b) Notice under this section shall be served, mailed, or delivered, or last published at least [10, 20] days before any hearing in this State.

[34]To ameliorate any inconvenience and expense to the out of state party, the UCCJA also provides that the court may require the other party to pay to the non-resident, court travel and other necessary expenses. UCCJA, (U.L.A.) §11, also at West's F.S.A. §61-1324 and Ga. Code §74-512.

Georgia courts have been willing to recognize judgments of sister states even when such judgments have been rendered in accordance with procedures dissimilar to those adopted by Georgia courts as long as due process was afforded to the parties. *Whitaker v. Whitaker,* 237 Ga. 895, 230 S.E.2d. 486 (1976); *Yearta f/k/a Scroggins v. Scroggins,* 245 Ga. 831, 268 S.E.2d. 151 (1980).

In summary, full faith and credit should have been granted to the Florida decree since the Florida court had *in personam* jurisdiction over the Respondent pursuant to standards articulated by this court in *International Shoe Co. v. Washington, supra, Shaffer v. Heitner, supra*; *Kulko v. Superior Court, supra,* and the Uniform Child Custody Jurisdiction Act as embodied in Florida law.

D. The Decree of the Florida Court Was Res Judicata As To All Issues of Law and Fact Then Existing and was Thereby Entitled to Full Faith and Credit in Georgia

A major requirement for the according of full faith and credit to a judgment or decree is that it be a valid and final judgment or decree having a *res judicata* effect in the state of its rendition. As stated by this Court, "a judgment from the rendering state controls in other states to the same extent as it does in the state where rendered."[35]

In two of the four cases entertained by this Court in the last forty years involving the issue of whether full faith and credit should be given to a custody decree, this Court has not

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[35]*Riley v. New York Trust Co.,* 315 U.S. 343, 349, 62 Sup.Ct. 608, 612, 86 L.Ed. 885, 891 (1942).

directly reached this issue on the basis that the custody decrees in question did not have a conclusive effect in the rendering state.

The first case which this Court considered was *New York ex rel. Halvey v. Halvey,* 330 U.S. 610, S.Ct. 903, 91 L.Ed. 1133 (1937). In *Halvey,* the mother took the child from the family home in New York to Florida and after about a year filed suit there for divorce and custody. The father, served by publication, did not file an answer, but instead went to Florida and took the child back to New York the day before entry of a default decree in favor of the mother. When she sought enforcement of the Florida decree by filing a writ of habeas corpus in New York, the New York court modified the Florida decree by giving the father visitation rights and possession of the child during vacations.

This Court in reviewing Florida law found that at that time a Florida court had the power to modify a custody decree at all times even on the basis of facts which were not presented or considered at a former hearing.[36] As a result, the Court found that Florida custody decrees were ordinarily not *res judicata* either in Florida or elsewhere. Therefore, the majority opinion written by Mr. Justice Douglas held that, "So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do. . .[I]t is clear that the state of the forum has at least as much leeway to disregard the judgment, to qualify it or depart from it as does the state where it was rendered."[37]

In *Ford v. Ford,* 376 U.S. 197, 83 S.Ct. 273, 9 L.Ed.2d 240 (1962), this Court again looked at the law of the state

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[36]*Halvey, supra,* 330 U.S. at 612-613; 67 S.Ct. at 905.

[37]*Id.*, 330 U.S. at 614-615, 67 S.Ct. at 906.

rendering the decree and determined that the decree did not have a *res judicata* effect in the rendering state.

In *Ford, supra,* the husband filed a petition for writ of habeas corpus in Virginia seeking custody of his minor children in the physical custody of his wife. The wife answered and after negotiations the parties entered into an agreement providing that the husband was to have custody of the children during the school year and that the wife was to have custody during summer vacation and other holidays. Upon such agreement the Virginia court issued a "dismissed agreed" order. Nine months later while the children were visiting in South Carolina with their mother, the wife filed suit for full custody in the appropriate court there. The husband, still a Virginia resident, entered a general appearance to contest the issue. The trial court found for the wife awarding her custody. The South Carolina Supreme Court reversed the lower court on the basis that the "dismissed agreed" order was *res judicata,* and in the absence of allegation or proof of a change of circumstances, held it was entitled to full faith and credit in South Carolina.[38]

This Court, in a unanimous opinion written by Mr. Justice Black, found after reviewing Virginia law, that Virginia would not consider a "dismissed agreed" order to be *res judicata* in a child custody case[39] and, therefore, reversed the decision of the South Carolina Supreme Court granting the full faith and credit to the Virginia decree.

In the case now before this Court, there is no doubt that both Florida and Georgia recognize their custody decrees as *res judicata* as to all issues of law and fact decided. The

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[38]*Supra,* 371 U.S. at 188-190, 83 S.Ct. at 274-5.

[39]*Id.*, 371 U.S. at 192-193, 83 S.Ct. at 276.

UCCJA, adopted in both Florida and Georgia, specifically provides that a custody decree rendered by a court of a state which had jurisdiction under the UCCJA jurisdictional provisions binds all parties who have been served in the state or notified in accordance with the Act's provisions for notice to out of state contestants, and provided with an opportunity to be heard. The Act further states that: "As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until the determination is modified in accordance with the provisions of this Act."[40]

In addition to meeting jurisdictional requirements of the UCCJA, other statutory and case law in both states requires that a finding of material change in circumstances occurring since the decree must be made prior to a court's modification of a custody decree. Ga. Code Ann. §74-515, Ga. Code Ann. §30-127, *Bannister v. Bannister,* 240 Ga. 518, 241 S.Ed.2d 247 (1978); *Stricklin v. Stricklin,* 383 So.2d 1183 (Fla.App. 1980).

While Georgia has never recognized the authority of a court granting a custody decree to exercise continuing jurisdiction to modify, change or revoke the decree. *Thomas v. Thomas,* 221 Ga. 652, 146 S.E. 2d 724 (1966), *Barrentine v. Barrentine,* 210 Ga. 749, 82 S.Ed. 2d 857 (1945); Florida has since the 1978 adoption of the UCCJA, also rejected the concept of continuing jurisdiction in custody matters - its law at the time of *Halvey, supra,* and no longer recognizes a Florida court's right to modify custody on the basis of facts not presented or considered at the former hearing. *Hegler v. Hegler,* 383 So.2d 1134 (Fla.App. 1980).

In summary, unlike the *Halvey* and *Ford* custody decrees, the custody decree rendered by the Florida court in this case

[40]UCCJA, (U.L.A.) §12; West's FS.A. §61.1328; Ga. Code §74-513.

was, according to Florida law, *res judicata* as to all issues of law and fact decided and as to the custody determination made. There being no leeway in the Florida court to disregard, qualify or depart from the judgment except upon a finding of a material change in conditions since the decree, Georgia erred in failing to recognize and enforce the decree.

E. There Was No Change of Conditions or Supervening Events Between the Rendition of the Florida Decree and Georgia's Assumption of Jurisdiction Which Justified the Refusal of the Georgia Court to Extend Full Faith and Credit

This Court in *Kovacs v. Brewer,* 356 U.S. 604, 78 S.Ct. 963, 2 L.Ed.2d 1008 (1958) found another basis to avoid reaching the full faith and credit issue - that of changed circumstances.

In *Kovacs, supra,* the child had lived in North Carolina with its paternal grandparents for three years, pursuant to a valid New York custody decree, when the mother petitioned for modification in New York. After a hearing in which the father and grandfather entered a general appearance without objecting to jurisdiction, the court modified the decree to give the mother custody. The child, thereafter, was kept in North Carolina contrary to the decree. Fourteen months later the mother brought proceedings to enforce the New York modification judgment in North Carolina. The North Carolina courts, after apparently considering both subsequent and previously litigated events, decided that the child should remain with the grandparents.

In an opinion by Justice Black the Supreme Court held on the basis of *Halvey* that the state of the forum has as much leeway to disregard the judgment, to qualify it or to depart

from it as does the state rendering the original judgment. Since New York could modify the decree if changed circumstances called for a different arrangement to protect the child's health and welfare, North Carolina also could modify custody based on changed circumstances after the rendition of the New York decree. However, because the factual basis for the North Carolina judgment was unclear, the case was remanded to the North Carolina courts to determine the existence of changed circumstances.

As previously shown, Florida also permits modification of a custody decree on the basis of a material change in conditions since the prior decree, but unlike the facts in *Kovacs, supra,* there was barely a month between the hearing and order in the Florida court proceedings on April 18, 1979, (J.A.25,26) and the hearing in the Georgia proceedings on May 10, 1979 (J.A.22) (T.1). There was no change in conditions to justify the Georgia courts refusal to grant full faith and credit to the Florida decree. In fact, Respondent did not even introduce any evidence in the Georgia hearing which related to changed conditions occurring after the April Florida hearing, but rather dwelt upon events that had occurred months prior to the Florida hearing. (T.21-31).

Since Florida law does not permit modification of custody without a material change in conditions and since the only evidence presented by Respondent to show a change of conditions in the Georgia proceeding related to events occurring before to the Florida hearing, the findings of fact and conclusions of law in the Florida decree were *res judicata* and entitled to full faith and credit in the Georgia courts.

In summary, Neither *Halvey, supra, Ford, supra,* nor *Kovacs, supra,* offer an appropriate rationale for the denial

of the application of the Full Faith and Credit Clause to the Florida decree in this case. Current Florida law, incorporating the UCCJA, makes custody decrees conclusive and *res judicata* as to all issues of law and fact decided, and there were no changed circumstances after the rendering of the Florida decree to support a modification of the decree in either Florida or Georgia.

III.

EXTENDING FULL FAITH AND CREDIT TO CUSTODY DECREES WOULD PROMOTE ORDERLY INTERSTATE CUSTODY LITIGATION.

The Full Faith and Credit Clause gives state court judgments res judicata effect. *Durfee v. Duke,* 375 U.S. 106, 109, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963). Res judicata serves essential functions in the judicial system. It permits litigants to rely on judicial decisions, and prevents "vexatious litigation." *Brown v. Felsen,* 442 U.S. 127, 131, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979). As has been shown above, the degree to which states must accord full faith and credit to custody decrees has not been definitively determined by this Court. The primary reason for the special concern over custody cases is stated in Justice Frankfurter's dissenting opinion in *Kovacs v. Brewer, supra.*

> Because the child's welfare is the contr[illegible] guide in a custody determination, a custody decree is of an essentially transitory nature. The passage of even a relatively short period of time may work great changes, although difficult of ascertainment, in the needs of a developing child. . . . A court that is called upon to determine to whom and under what circumstances

> custody of an infant will be granted cannot, if it is to perform its functions responsibly, be bound by a prior decree of another court, irrespective of whether "changes in circumstances" are objectively provable.

Id., 356 U.S. at 612. There is little disagreement over the concept that custody decrees should not be immutable, either where rendered or elsewhere, because changes in circumstances may make it appropriate for a minor child to live with the parent not originally granted legal custody. But the paramount concern for ensuring that all custody decrees can be modified when necessary to protect minor children's interests has resulted in rules of law and practices that have had adverse consequences for both parents and children. Few custody cases involve one perfectly fit parent and one totally unfit parent. Most custody disputes could be resolved responsibly by awarding legal custody to either of the contestants. The absence of a full faith and credit mandate as to the circumstances existing at the time of a custody award means that the courts of a state can reweigh evidence considered by the courts of another state, and make contrary findings of fact and law based on that evidence. This is an invitation to the losing party in a custody dispute to seek another try at securing custody, by removing the minor children involved to another jurisdiction and filing a new custody case. The law review articles cited in this brief demonstrate that concern for the negative impact of the current status of custody awards on family life outweighs the legitimate desire to ensure that custody awards are made by courts exercising their discretion fully in determining what is best for minor children. Full faith and credit for custody decrees means only that the facts existing at the time a court makes a custody determination cannot be the basis for a contrary decision by the courts of another state. This case

presents this issue squarely. In April of 1979, a Florida court found that Petitioner's conduct and the home environment for her minor child during February of 1979 did not justify changing legal custody of the child to Respondent. In June of 1979, a Georgia court found that Petitioner's conduct and the child's home environment in Florida in February of 1979 justified changing legal custody to Respondent. This situation is directly contrary to the constitutional purpose of the Full Faith and Credit Clause, which is to require parties to litigation to honor valid court orders, and to limit them to one trial on a particular factual and legal issue. *Johnson v. Muelberger,* 340 U.S. 581, 585, 71 S.Ct. 474, 95 L.Ed. 552 (1951). While a state's interest in the welfare of minors within its boundaries is strong, Petitioner submits that current realities make it essential that local concerns give way so that custody adjudication can become a part of our federal system, with all the consistency and protection of the rights of parties that system provides. *Sherrer v. Sherrer,* 334 U.S. 343, 355, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948). The Uniform Child Custody Jurisdiction Act will help in interstate custody determinations, but it cannot substitute for full faith and credit for decrees such as the one made by the Florida court in this case, because its provisions are subject to varying interpretations by the states enacting it. *See generally* 96 A.L.R.3d 968. Petitioner therefore contends that the interests of all parties to custody litigation, and of society as a whole, would be served by extending full faith and credit to custody decrees rendered by courts having jurisdiction over the parties and subject matter consistent with the due process requirements of *International Shoe, supra.*

CONCLUSION

For the foregoing reasons, the Petitioner urges this Court to reverse the decision of the Georgia Supreme Court.

Respectfully submitted,

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APPENDIX A

FLORIDA STATUTES

West's F.S.A. 61.1302 Short Title

Sections 61.1302-61.1348 may be known and shall be cited as the "Uniform Child Custody Jurisdiction Act."

Laws 1977, c. 77-133, §1, eff. Oct. 1, 1977.

West's F.S.A. 61.1304 Purpose of Act; Construction of Provisions

The general purposes of this act are to:

(a) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being.

(2) Promote cooperation with the courts of other states to the end that a custody decree is rendered in the state which can best decide the case in the interest of the child.

(3) Assure that litigation concerning the custody of a child takes place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state.

(4) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child.

(5) Deter abductions and other unilateral removals of children undertaken to obtain custody awards.

(6) Avoid relitigation of custody decisions of other states in this state insofar as feasible.

(7) Facilitate the enforcement of custody decrees of other states.

(8) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child.

(9) Make uniform the law with respect to the subject of this act among states enacting it.

Laws 1977, c. 77-433, § 3, eff. October 1, 1977.

West's F.S.A. 61.1306 Definitions

As used in this act:

(1) "Contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child.

(2) "Custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person.

(3) "Custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for dissolution of marriage or separation, and includes child neglect and dependency proceedings.

(4) "Decree" or "custody decree" means a custody determintion contained in a judicial decree or order made in a custody proceeding, and includes an initial decree and a modification decree.

(5) "Home state" means the state in which the child, immediately preceding the time involved, lived with his parents, a parent, or a person acting as parent for at least 6 consecutive months or, in the case of a child less than 6

months old, the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period.

(6) "Initial decree" means the first custody decree concerning a particular child.

(7) "Modification decree" means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court.

(8) "Physical custody" means actual possession and control of a child.

(9) "Person acting as parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody.

(10) "State" means any state, territory, or possession of the United States; the Commonwealth of Puerto Rico; or the District of Columbia.

Laws 1977, c. 77-433, §3, eff. Oct. 1, 1977.

West's F.S.A. 61.1308 Jurisdiction

(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(a) This state:

(1) Is the home state of the child at the time of commencement of the proceeding, or

(2) Had been the child's home state within 6 months before commencement of the proceedings and the child is absent from the state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state;

(b) It is in the best interest of the child that a court of this state assume jurisdiction because:

1. The child and his parents, or the child and at least one contestant, have a significant connection with this state, and

2. There is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(c) The child is physically present in this state and:

1. The child has been abandoned, or

2. It is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected; or

(d)1. It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraph (a), paragraph (b), or paragraph (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and

2. It is in the best interest of the child that a court of this state assume jurisdiction.

(2) Except under paragraph (c) or paragraph (d) of subsection (1), physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

Laws 1977, c. 77-433, §4, eff. Oct. 1, 1977.

West's F.S.A. 81.131 Notice and Opportunity to be Heard

Before a decree is made under this act, reasonable notice and opportunity to be heard shall be given to the contestants,

any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this state, notice and opportunity to be heard shall be given pursuant to §61.1312.

Laws 1977, c. 77-433, §5, eff. Oct. 1, 1977.

West's F.S.A. 61.1312 Notice to Persons Outside this State: Submission to Jurisdiction

(1) Notice required for the exercise of jurisdiction over a person outside this state shall be given in a manner reasonably calculated to give actual notice, and may be:

(a) By personal delivery outside this state in the manner prescribed for service of process within the state;

(b) In the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;

(c) By any form of mail addressed to the person to be served and requesting a receipt; or

(d) As directed by the court, including publication, if other means of notification are ineffective.

(2) Notice under this action shall be served, mailed, delivered, or last published at least 20 days before any hearing in this state.

(3) Proof of service outside this state may be made by affidavit of the individual who made the service or in the manner prescribed by the law of this state, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.

(4) Notice is not required if a person submits to the jurisdiction of the court.

Laws 1977, c. 77-433, §6, eff. Oct. 1, 1977.

West's F.S.A. 61.132 Information Under Oath to be Submitted to the Court

(1) Every party in a custody proceeding, in his first pleading or in an affidavit attached to that pleading, shall give information under oath as to the child's present address, the places where the child has lived within the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath whether:

(a) He has participated as a party or witness or in any other capacity in any other litigation concerning the custody of the same child in this or any other state;

(b) He has information of any custody proceeding concerning the child pending in a court of this or any other state; and

(c) He knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

(2) If the declaration as to any of the above items is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case.

(3) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in this or any other state of which he obtained information during this proceeding.

Laws 1977, c. 77-433, § 10, eff. Oct. 1, 1977.

West's F.S.A. 61.1324 Appearance of Parties and the Child

. . .(3) If a party to the proceeding who is outside this state is directed to appear under subsection (2) or desires to appear personally before the court with or without the child, the court may require another party to pay to the clerk of the court travel and other necessary expenses of the party so appearing and of the child if this is just and proper under the circumstances.

Laws 1977, c. 77-433, §12, eff. Oct. 1, 1977.

West's F.S.A. 61.1326 Binding Force and Res Judicata Effect of Custody Decrees

A custody decree rendered by a court of this state which has jurisdiction under s. 61.1308 binds all parties who have been served in this state or notified in accordance with s. 61.1312 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties, the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this act.

Laws 1977. c. 77-433, §13, eff. Oct. 1, 1977.

West's F.S.A. 61.1328 Recognition of Out-of-State Custody Decrees

The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this act, or which decree was made under factual circumstances meeting the jurisdictional standards of the act, so long as this decree has not

been modified in accordance with jurisdictional standads substantially similar to those of this act.

Laws 1977, c. 77-433, § 14, eff. Oct. 1, 1977.

APPENDIX B

GEORGIA STATUTES

CHAPTER 74-5. UNIFORM CHILD CUSTODY JURISDICTION ACT

Ga. Code §74-501 Short Title

This Chapter shall be known and may be cited as the "Uniform Child Custody Jurisdiction Act."

(Acts 1978, pp. 258, 259, eff. Jan. 1, 1979.)

Ga. Code §74-502 Purpose of Chapter; Construction

The general purposes of this Chapter are to:

(1) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on children's well-being.

(2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in the State which can best decide the case in the interest of the child.

(3) Assure that litigation concerning the custody of a child takes place ordinarily in the State with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available and to also assure that courts of this State decline the exercise of jurisdiction when the child and his family have a closer connection with another State.

(4) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child.

(5) Deter abductions and other unilateral removals of children undertaken to obtain custody awards.

(6) Avoid unnecessary relitigation of custody decisions of other States in this State.

(7) Facilitate the enforcement of custody decrees of other States.

(8) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this State and those of other States concerned with the same child.

(9) Make uniform the law of those States which enact the Uniform Child Custody Jurisdiction Act.

(b) This Chapter shall be construed to promote the general purposes stated in this section.

(Acts 1978, pp. 258, 259, eff. Jan. 1, 1979.)

Ga. Code §74-503 Definitions

As used in this Chapter: . . .

(a) "Contestant" means a person (including, but not limited to, a parent) who claims a right to custody or visitation rights with respect to a child.

(b) "Custody determination" means a court decision and court orders and instructions providing for the custody of a child, including, but not limited to, visitation rights. "Custody determination" does not include a decision relating to child support or any other monetary obligation of any person.

(c) "Custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings.

(d) "Decree" or "custody decree" means a custody determintion contained in a judicial decree or order made in a custody proceeding, and includes, but is not limited to, an initial decree and a modification decree.

(e) "Home state" means the state in which the child immediately preceding the time involved, lived with his parents, a parent, or a person acting as parent for at least six consecutive months and, in the case of a child less than six months old, the State in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period.

(f) "Initial decree" means the first custody decree concerning a particular child.

(g) "Modification decree" means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court.

(h) "Physical custody" means actual possession and control of a child.

(i) "Person acting as parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody.

(j) "State" means any State, territory, or possession of the United States; the Commonwealth of Puerto Rico; and the District of Columbia.

Acts 1978, pp. 258, 260, eff. Jan. 1, 1979.)

Ga. Code §74-504 Jurisdiction to Make Child Custody Determination

(a1) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) This State (A) is the home State of the child at the time of commencement of the proceeding, or (B) had been the child's home State within six months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) It is in the best interest of the child that a court of this State assume jurisdiction because (A) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (B) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) The child is physically present in this State and (A) the child has been abandoned or (B) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4)(A) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another State has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (B) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

(Acts 1978, pp. 258, 262, eff. Jan. 1, 1979.)

Ga. Code §74-505 Notice and Opportunity to be Heard

Before making a decree under this Chapter, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this State, notice and opportunity to be heard shall be given pursuant to section 74-506.

(Acts 1978, pp. 258, 263, eff. Jan. 1, 1979.)

Ga. Code § 74-506 Notice to Persons Outside this State: Submission to Jurisdiction

(a) Notice required for the exercise of jurisdiction over a person outside this State shall be given in a manner reasonably calculated to give actual notice, and may be made:

(a) By personal delivery outside this State in the manner prescribed for service of process within this State.

(2) In the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;

(3) By any form of mail addressed to the person to be served and requesting a receipt.

(4) As directed by the court including, but not limited to, publication, if other means of notification are ineffective.

(b) Notice under this action shall be served, mailed, delivered, or last published at least 30 days before any hearing in this State.

(c) Proof of service outside this State may be made by affidavit of the individual who made the service, or in the manner prescribed by the law of this State, the order pursuant to which the service is made, or the law of the

place in which the service is made. If service is made by mail, proof may be a receipt signed by the person to whom the service is addressed or other evidence of delivery to the person to whom the service is addressed.

(d) Notice is not required if a person submits to the jurisdiction of the court.

(Acts 1978, pp. 258, 263, eff. Jan. 1, 1979.)

Ga. Code §74-150 Information Under Oath to be Submitted to the Court

(a) Every party in a custody proceeding in his first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last five years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath whether:

(1) He has participated as a party, witness, or in any other capacity in any other litigation concerning the custody of the same child in this or any other State.

(2) He has information of any custody proceeding concerning the child pending in a court of this or any other State.

(3) He knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

(b) If the declaration as to any of the above items is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case.

(c) Each party has a continuing duty to inform the court

of any custody proceeding concerning the child in this or any other state of which he obtained information during this proceeding.

(Acts 1978, pp. 258, 267, eff. Jan. 1, 1979.)

Ga. Code §74-512(c) Appearance of Parties and the Child

(a) The court may order any party to the proceeding who is in this State to appear personally before the court. If that party has physical custody of the child, the court may order that he appear personally with the child.

(b) If a party to the proceeding whose presence is desired by the court is outside this State with or without the child, the court may order that the notice given under section 74-506 include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party.

(c) If a party to the proceeding who is outside this State is directed to appear under subsection (b) or desires to appear personally before the court with or without the child, the court may require another party to pay to the clerk of the court travel and other necessary expenses of the party so appearing and of the child if this is just and proper under the circumstances.

(Acts 1978, pp. 258, 268, eff. Jan. 1, 1979.)

Ga. Code §74-513 Binding Force and Res Judicata Effect of Custody Decree

A custody decree rendered by a court of this State which had jurisdiction under section 74-504 binds all parties who have been served in this State or notified in accordance with

section 74-506 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law including, but not limited to, the provisions of this Chapter.

(Acts 1978, pp. 258, 269, eff. Jan. 1, 1979.)

Ga. Code §74-514 Recognition of Out-of-State Custody Decrees

The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Chapter or which was made under factual circumstances meeting the jurisdictional standards of the Chapter, so long as this decree has not been modified in accordance with jurisdictional standards substanttially similar to those of this Chapter.

(Acts 1978, pp. 258, 269, eff. Jan. 1, 1979.)